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No. 11001.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JESSE M. CARNEY and MILTON GRADY RAMSEY,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

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To the Honorable United States Circuit Court of Appeals for the Ninth Circuit:

Your petitioners respectfully petition for rehearing on Count Two of the indictment, and as grounds for rehearing the defendants assign the following:

I.

The Court erred in in its construction and interpretation of the Fourth and Fifth Amendments to the Constitution of the United States as applied to this case. The affidavit in support of the search warrant was insufficient.

II.

The court erred in holding that the defendant could not be prejudiced by the receipt of evidence of Count One of the indictment.

I.

(1) The court's position is, we think, erroneous: That no search warrant was necessary for the search of the *garage*. The Fourth Amendment does not separate searches on one's premises as distinguished between houses and garages.

The Fourth Amendment says:

> "Amdt. 4. Security from unreasonable searches and seizures. The right of the people to be *secure* in their persons, houses, papers *and effects,* against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and *particularly describing the place to be searched, and the persons or things to be seized.*" (Italics ours.)

We think that "effects" include those in a garage as well as in his house.

The cases cited in the opinion also relate to liquor where "the odor coming from it were beer and the things seen in the buildings were such as are used in making beer." These are distinguishable from the case where there are no odors to detect and nothing except an exploratory search for evidence, forbidden under the Fourth and Fifth Amendments. (*Marron v. United States.*)

We recognize that there are some decisions that hold that a garage has a different standing than a home. (*Earl v. United States,* 4 F. (2d) 532.) This case, however, was based upon a set of facts where an automobile was watched for bootleg liquor for several hours. The officers going into the garage saw the liquor, and the courts held that under the circumstances of that case no search warrant would have been necessary.

We find no case where the subject matter of the observations were innocent in and of themselves and in which the search has been upheld as lawful.

The language of the Fourth Amendment is "in their persons, houses, papers and effects," which would seem to be all inclusive and does not exclude a garage where one's effects may be kept.

The court also failed to point out in its opinion where the affidavits in support of the search warrant were sufficient to show probable cause to believe that the crime of counterfeiting was being committed and to name specifically *all* the articles seized under the warrant. Certainly the purchase of articles innocent in and of themselves does not give officers a right to conclude that they are being used for criminal purposes.

Nothing set out in the affidavits show any reasonable or probable cause to believe that the articles, to-wit: The press, the inks, etc., were to be used for any criminal purpose.

The return does not show the same articles set out in the affidavit [R. 23, 25, 27, 30].

B.

The Court Erred in Holding That the Affidavits Set Forth Sufficient Facts to Establish Probable Cause.

The test of whether there was or was not probable cause is whether there are sufficient facts in the affidavit which in and of themselves would be competent in the trial of the offense before a jury and would lead a man of prudence to believe that the offense of counterfeiting had been committed. (*Grau v. United States,* 287 U. S. 124-129, 77 L. Ed. 212.)